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ALEXANDER L. STEVAS,

83-714

No.

IN THE

Supreme Court of The United States

OCTOBER TERM, 1983

CITY OF DUNCANVILLE, TEXAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Certiorari to the United States Court of Appeals, Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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October 28, 1983

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in remanding the case to the Trial Court because of inadequate instructions concerning the substitute facility standard, where no objection to the instructions was made in the Trial Court as is required by Federal Rule of Civil Procedure 51, and where no error was assigned by either party in briefs filed in the Court of Appeals as is required by Rule 28, Federal Rules of Appellate Procedure?

2. Whether the "plain error" rule may be applied by the Court of Appeals in civil cases where instructions to the jury were given without objection by either party?

3. Whether the "plain error" rule may be applied in a civil case where instructions were given as requested by the parties, and where no error was raised in either the Trial Court or Court of Appeals by either party?

LISTING OF PARTIES

Petitioner

The following Petitioner is located in Dallas County, Texas.

CITY OF DUNCANVILLE, TEXAS

Respondent

The Respondent is:

UNITED STATES OF AMERICA

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit in UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE, V. 50 ACRES OF LAND, ETC., ET AL, DEFENDANT, THE CITY OF DUNCANVILLE, DEFENDANT-APPELLANT (NO. 81-1615).

OPINION BELOW

The Opinion of the United States Court of Appeals, Fifth Circuit, is reported at 706 Fed. 2d 1356 and reproduced at Appendix Page A-1. The Judgment of the United States Court of Appeals, for the Fifth Circuit, dated June 13, 1983, is produced at Appendix Page A-21. The Order denying petition for a rehearing and suggestion for rehearing en banc filed by Appellant, City of Duncanville, and Appellee, United States of America, dated September 19, 1983, is reproduced at Appendix Page A-22.

JURISDICTION

The Judgment of the Court below was entered on June 13, 1983, Petitions for Rehearing were timely filed below, and the Petitions for Rehearing were denied on September 19, 1983.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULES OF CIVIL PROCEDURE AND FEDERAL RULES OF APPELATE PROCEDURE

"RULE 51, FEDERAL RULES OF CIVIL PROCEDURE

At the close of the evidence or at such earlier time during the trial as the Court reasonably directs, any party may file written request that the Court instruct the jury on the law as set forth in the request. The Court shall inform counsel of its proposed action upon the request prior to the arguments to the jury, but the Court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

RULE 28, FEDERAL RULES OF APPELLATE PROCEDURE

"(b) BRIEF OF THE APPELLEE. The Brief of the Appellee shall conform to the requirements of subdivision (a) (1)-(4), except that a statement of the issues or of the case need not be made unless the Appellee is dissatisfied with the Statement of the Appellant.

(a) BRIEF OF THE APPELLANT. The Brief of the Appellant shall contain under appropriate headings and in the order here indicated:

(2) A statement of issues presented for a review."

THE STATEMENT OF THE CASE

This is a federal condemnation case. The United States condemned a 50 acre tract of land owned by the City of Duncanville, a municipal corporation in Texas. The property in question was being used as a sanitary landfill by the City of Duncanville. The Petitioner is the City of Duncanville and the Respondent is United States of America.

In the Trial Court the United States contended that the proper measure of damages was the market value of the 50 acres being condemned. The City contended that the proper measure of damages was the reasonable cost of substitute facilities necessary to replace the sanitary landfill being condemned by the United States. The case was tried and submitted to the jury on both theories, with the jury fixing Two Hundred Twenty-five Thousand Dollars ($225,000.00) as the market value of the tract condemned, and Seven Hundred Twenty-three Thousand Six Hundred Twenty-four Dollars and One Cent ($723,624.01) as the reasonable cost of a functionally equivalent substitute facility. A Judgment was entered in the Trial Court for the finding on market value, in the sum of Two Hundred Twenty-five Thousand Dollars ($225,000.00).

The City appealed to the Court of Appeals for the Fifth Circuit. That Court reversed the Judgment of the Trial Court and held that the reasonable cost of substitute facilities was the proper measure of damages and also held that the Trial Court incorrectly fixed the interest on the Judgment.

The Circuit Court did not render judgment on the jury verdict fixing the reasonable cost of a functionally equivalent substitute facility, but remanded the case to the Trial Court because it concluded that the instructions given to the jury concerning the meaning of "substitute facilities" was inadequate to enable the jury to make a fair and complete determination of the cost, including consideration of benefits received, of this particular substitute facility. Under the instructions given to the jury in the Trial Court the jury returned an award of Seven Hundred Twenty-three Thousand Six Hundred Twenty-four Dollars and One Cent ($723,624.01) as the reasonable cost of substitute facilities out of expenses of One Million Two Hundred Seventy-six Thousand Three Hundred Eleven Dollars and Sixteen Cents ($1,276,311.16) incurred by the City of Duncanville.

The case was remanded to the Trial Court although no objection was made to the charge as is required by Rule 51, Federal Rules of Civil Procedure, and no point of error was assigned by Appellee to the Court's charge as is required by Rule 28, Federal Rules of Appellate Procedure.

Without so stating, the Circuit Court has apparently remanded the case under the "plain error" rule since no objections were made in the Trial Court or Court of Appeals to the instructions given to the jury relating to the "substitute facilities" doctrine.

REASONS FOR GRANTING THE WRIT

A Writ of Certiorari should be granted in this case to resolve the question as to whether or not the "plain error" rule should be permitted in any civil case, and particularly whether or not the "plain error" rule is appropriate in the present case.

Rule 51 of the Federal Rules of Civil Procedure clearly and unequivocally requires objections to a court's charge to be made in the Trial Court. Rule 28 of the Federal Rules of Appellate Procedure clearly requires the Appellee to bring forward in its Brief any issues which it desires to have the Court to rule upon. These rules are applicable to all Federal Courts, however, in some circuits, including the Fifth Circuit, these rules are ignored by application of the "plain error" doctrine.

This writ should be granted because the Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

THERE IS A CONFLICT AMONG COURTS OF APPEALS

The Court of Appeals for the 5th Circuit has applied the "plain error" standard in numerous cases. *Wirtz v. International Harvester Company,* 331 F.2d 462, 465-66 (5th Cir. 1964); *Gower v. Cohn,* 643 F.2d 1146 (5th Cir. 1981); *Ramada Development Co. v. Rauch,* 644 F.2d 1097 (5th Cir. 1981); *Whiting v. Jackson State University,* 616 F.2d 116 (5th Cir. 1980); *Liner v. J. B. Talley and Co., Inc.,* 618 F.2d 327 (5th Cir. 1980) and *Cruthirds v. R. C. I., Inc.,* 624 F.2d 632 (5th Cir. 1980).

In the case of *Monsma v. Central Mutual Insurance Company,* 392 F.2d 49 (9th Cir. 1968), the 9th Circuit held that the "plain error" rule may not be utilized in civil cases.

This Court should grant a writ and clearly state, for once and for all, whether or not the "plain error" rule is applicable in civil cases in light of the uncompromising

language and the policies of fairness and judicial efficiency incorporated in Rule 51, Federal Rules of Civil Procedure.

THE QUESTION IS SUBSTANTIAL

Whether or not Rule 51 of the Federal Rules of Civil Procedure can be ignored in some circuits and strictly applied in civil cases in other circuits presents a substantial federal question which should be resolved. Rules of Civil Procedure which are designed to be applied in all circuits should be uniformly applied in the circuits, and where this is not done this Court should exercise its supervisory powers to assure uniform application of the Rules of Civil Procedure.

Also, Rule 28 of the Federal Rules of Appellate Procedure should be uniformly applied in all circuits. To permit a circuit court to ignore the plain and unambiguous requirements of these rules creates much doubt and uncertainty in the administration of the Federal judicial system.

THE DECISION BELOW IS INCORRECT

The Trial Judge sought to avoid a remand of this case by submitting to the jury the theory advocated by each party and instructing the jury regarding such issues without objection by either party to the issues as submitted. This was done to permit the Appellate Court to reverse and render judgment in the event the Trial Court selected the incorrect measure of damages. This deliberate and carefully considered action by the Trial Court has been frustated by the Court of Appeals remanding the case where no error was asserted in either the Trial Court or Appellate Court.

The jury was instructed that the cost of substitute facilities means the reasonable cost of supplying substitute facilities reasonably necessary to enable it to serve its constituents in approximately the same way as it would had the condemnation not occurred. The jury was instructed to determine the reasonable cost of construction of a functionally equivalent substitute sanitary landfill. Out of expenses incurred by the City in constructing a new sanitary landfill costing One Million Two Hundred Seventy-six Thousand Three Hundred Eleven Dollars and Sixteen Cents ($1,276,311.16), the jury awarded only Seven Hundred Twenty-three Thousand Six Hundred Twenty-four Dollars and One Cent ($723,624.01) as the reasonable cost of a functionally equivalent substitute sanitary landfill. The Circuit Court specifically held that the City had met its burden of proving the cost of a functionally equivalent substitute facility.

Even if the "plain error" standard is applicable in civil cases, we respectfully submit that the Court of Appeals has ignored its stated standards in applying the "plain error" rule to the present case.

In the case of *Gower v. Cohn*, 643 F.2d 1146 (5th Cir. 1981) the court stated that the "plain error" rule should not be applied where the case implicated no "broader interest than that of the immediate litigants" and that none of the alleged errors rises the "exceptional" level required to constitute "plain error".

In the present case there is actually no greater interest implicated than that of the immediate litigants. In other words, if the fair market value is the proper measure of damages, the amount to be paid by the United States is Two Hundred Twenty-five Thousand Dollars ($225,000.00), if the substitute facility value is to be applied the amount

to be paid by the United States is the sum of Seven Hundred Twenty-three Thousand Six Hundred Twenty-four Dollars and One Cent ($723,624.01). In other words, the reverse and remand of the case or reverse and rendering of the case involves only the question as to the amount of damages to be paid by the United States.

In the case of *Delesdernier v. Porterie,* 666 F.2d 116 (5th Cir. 1982) the court said that ordinarily the court would not consider issues which were only raised for the first time on appeal except where a refusal to consider the issue would result in a miscarriage of justice or where there was no opportunity to make a timely objection.

In this case there was ample opportunity to make timely objections to the Court's charge, and none were made and no question raised on appeal by the Appellee, and the application of Rule 51 would certainly not result in a miscarriage of justice.

In *Whiting v. Jackson State University,* 616 F.2d 116 (5th Cir. 1980) the court said that if no objection was raised to the jury charge in the Trial Court, that under Federal Rules of Civil Procedure 51 it could not be considered on appeal unless the error is so fundamental as to result in a miscarriage of justice.

In the case of *Liner v. J. B. Talley and Co., Inc.,* 618 F.2d 327 (5th Cir. 1980) the court noted that Federal Rules of Criminal Procedure 52(b) makes provision for noticing plain errors or defects affecting substantial rights, and that there is no such rule under the Federal Rules of Civil Procedure. The court in recognizing the "plain error" doctrine said that it should be confined to exceptional cases where the error has seriously affected the fairness, integrity, or public reputation of judicial proceedings.

In the present case there was ample opportunity for the Appellee to object to the Court's charge, which it did not, and we respectfully submit that it cannot be seriously urged that awarding damages as found by the jury has seriously affected the fairness, integrity, or public reputation of judicial proceedings.

In the case of *Vicksburg Furniture Mfg., Ltd. v. Aetna Casualty and Surety Company,* 625 F.2d 1167 (5th Cir. 1980) the court held that failure to give a jury instruction offered by the plaintiff must constitute a fundamental error to merit notice on appeal. In the case of *Patton v. Archer,* 590 F.2d 1319 (5th Cir. 1979), after referring to Federal Rules of Civil Procedure 51, the court said that it is true that even absent an objection an appellate court will notice error so fundamental as to result in a miscarriage of justice, but that power would only be exercised in exceptional cases.

In the present case the jury was specifically instructed to determine the reasonable cost of construction of a functionally equivalent substitute sanitary landfill. No objections were made to this instruction, and, as a matter of act, the word "reasonable" was submitted into the instruction at the request of the attorneys for the United States. The Court below said that the "reasonable cost" of a "functionally equivalent substitute sanitary landfill" is too brief a standard to insure the jury will balance these various positive and negative attributes.

We respectfully submit that the jury did balance the various positive and negative attributes involved by awarding only Seven Hundred Twenty-three Thousand Six Hundred Twenty-four Dollars and One Cent ($723,624.01) as the cost of such substitute facilities out of more than One Million Two Hundred Seventy-six Thousand Dollars ($1,276,000.00) spent by the City in acquiring a substitute facility.

Finally, in conclusion, we respectfully submit that if the "plain error" doctrine is applicable in civil cases, the Circuit Court has incorrectly applied the "plain error" doctrine to the present case by ignoring the standards and criteria which it has stated must exist before the requirements of Rule 51 of the Federal Rules of Civil Procedure may be ignored.

For these reasons the Circuit Court erred in remanding the case and should have rendered judgment in favor of the City in the amount found by the jury to be the reasonable cost of a functionally equivalent substitute sanitary landfill.

PROPER RATE OF INTEREST

This case has also been remanded for consideration by the lower court of the proper rate of interest to be applied to the Judgment. This question was raised by the Petitioner in the court below and was sustained. In the event that this Court should determine that the Judgment of the court below should be rendered in favor of the City in the amount of Seven Hundred Twenty-three Thousand Six Hundred Twenty-four Dollars and One Cent ($723,624.01), with interest as found by the Trial Court, the City would waive its assigned error as to the proper amount of interest on the Judgment.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SANER, JACK, SALLINGER & NICHOLS

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APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

50 ACRES OF LAND, etc., et al., Defendant,

The City of Duncanville,
Defendant-Appellant.

No. 81-1615.

United States Court of Appeals,
Fifth Circuit.

June 13, 1983.

City appealed from judgment of the United States District Court for the Northern District of Texas, Robert M. Hill, J., 529 F.Supp. 220, entered on jury verdict in eminent domain action brought against city. The Court of Appeals, Brown, Circuit Judge, held that: (1) public condemnee which has legal or factual duty to replace condemned facility is entitled to reasonable cost of functionally equivalent substitute facility; (2) trial court's instructions on that theory were inadequate as they did not call for jury to consider any benefits gained by city from obtaining new site for landfill facility; and (3) city would be permitted on remand to present evidence as to the proper rate of interest.

Reversed and remanded.

1. Eminent Domain (Key) 133

Under the Fifth Amendment, public condemnee which has a legal or factual duty to replace the condemned facility is entitled to the reasonable costs of a functionally equivalent substitute facility. U.S.C.A. Const.Amend. 5.

2. Eminent Domain (Key) 133

Generally, substitute-facility standard for measuring just compensation has been applied to the condemnation of streets, alleyways, bridges, sewers, and other public facilities for which fair market value cannot be accurately determined; if no substitute facility is necessary, fair market value will be the standard for compensation; often, only nominal damages are justified where such items need not be replaced.

3. Eminent Domain (Key) 122

Object of just compensation is to place a condemnee in as good a position pecuniarily as if his property had not been taken; he must be made whole but he is not entitled to more.

4. Eminent Domain (Key) 122

Purpose of just compensation is to reimburse the owner condemnee for the loss he has suffered by the taking of his property.

5. Eminent Domain (Key) 133

When considering whether public condemnee is entitled to reimbursement on the replacement-facility basis, condemning government must demonstrate more than a reasonably adequate or reasonably passable alternative to that which had previously been used; condemnee is entitled to a facility or method which will handle its legal duty in an equally adequate manner as would have been true had there been no condemnation.

6. Eminent Domain (Key) 133

To deny city reimbursement for its unavoidable loss in replacing sanitary landfill facility upon condemnation by the federal government would be to deny just compensation.

7. Eminent Domain (Key) 205

City which submitted evidence of price of land and expense of preparing site for use as garbage facility presented sufficient evidence to present a case as to the cost of substitute facilities in order to be entitled to have jury consider that theory of reimbursement upon condemnation of original landfill site by federal government.

8. Eminent Domain (Key) 222(6)

Trial court instruction which set forth general purpose and meaning of the substitute-facility standard for reimbursing city for taking of its landfill facility did not adequately enable the jury to make a fair and complete determination of the costs as it did not take into account the need to deduct for benefits which city would gain from acquisition of new site.

9. Eminent Domain (Key) 133

City whose landfill facility was being condemned by government was entitled to reimbursement for reasonable cost of alternative site along with reasonable costs of preparing the site for use as a landfill.

10. Eminent Domain (Key) 263

In view of recent nature of Court of Appeals holding that 6% interest provided by the Declaration of Taking Act is a floor and not a ceiling, city, which had obtained new trial for consideration of damages in eminent domain action against it, would be permitted to present evidence on the proper rate of interest, even though it had not presented evidence of a higher rate at the initial trial. Declaration of Taking Act, § 1 et seq., 40 U.S.C.A. § 258a et seq.

Appeal from the United States District Court for the Northern District of Texas, 529 F.Supp. 220.

Before BROWN and JOLLY, Circuit Judges, and MAHON*, District Judge.

JOHN R. BROWN, Circuit Judge:

[1] Today we find ourselves lodged among melon rinds, coffee grounds, countless tin cans and sundry other unlikely neighbors amidst the City of Duncanville sanitary landfill. In this ignoble setting, we examine one of our most treasured constitutional principles — the Fifth Amendment's precept that private property shall not be taken for public purposes without just compensation. We consider the question of what constitutes the payment of "just compensation" to a public condemnee who has a duty to replace a condemned public facility. Appellee, the United States, contends that Duncanville is entitled only to the fair market value of its old landfill, which was condemned by the government. Duncanville argues that just compensation is the cost of a substitute landfill. We agree with Duncanville and conclude that under the Fifth Amendment a public condemnee which has a legal or factual duty to replace a condemned facility is entitled to the reasonable cost of a functionally equivalent substitute facility. We conclude also that the trial court's instruction concerning the substitute facilities standard was inadequate to enable the jury to make an intelligent determination of that cost. Accordingly, we remand for a new trial.

Indeed, this case is redolent with Fifth Amendment issues, as Duncanville objects also to the trial court's award of 6% interest under the Declaration of Taking Act, 40 U.S.C. § 258a. This Court has very recently held that

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* District Judge of the Northern District of Texas, sitting by designation.

the 6% rate is a floor, not a ceiling, on allowable rates of interest in this situation, and that the refusal to allow a higher rate of interest may be a denial of just compensation under the Fifth Amendment. *U.S. v. 329.73 Acres of Land, Situated in Grenada and Yalobusha Counties, State of Mississippi,* (5th Cir.1983) (*en banc*) 704 F.2d 800. As we remand for a new trial on the issue of the reasonable cost of a substitute facility, we also remand to the district court the question of a proper rate of interest.

Duncanville is a small home rule city of approximately 28,000 people located in the southwest portion of Dallas County, Texas. It operated a sanitary landfill on a tract of approximately 50 acres southwest of the city, along Ballwag Road in Dallas County, near the Tarrant County line. The United States condemned this tract (the Ballwag site) pursuant to the construction of Lakeview Lake, a redundantly named U.S. Army Corps of Engineers flood control project.[1] In accordance with the provisions of the Declaration of Taking Act, the government deposited its estimated value of the condemned property, $199,950.00, into the registry of the Court.[2]

For approximately two years after the taking of the Ballwag site, Duncanville trucked its daily garbage to a landfill near Ferris, Texas, some 22 miles to the southeast. It then acquired a new site of its own in northwest Ellis County (the Ellis County site), approximately the same driving time from Duncanville as the Ballwag site. This site consists of approximately 113.7 acres. Duncanville has been using the Ellis County site since January 1, 1981.

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[1] The parties stipulated to October 3, 1978, as the date of taking.

[2] This money was redeposited in an interest-bearing bank account and later withdrawn, with the accrued interest, by the City of Duncanville.

Duncanville demanded a jury trial on the issue of compensation, contending that the amount offered by the government was inadequate because Duncanville was entitled to the reasonable cost of substitute facilities, rather than merely the fair market value of the condemned property. Duncanville asked for the cost of the Ellis County land, the costs of permitting and preparation, and the costs of the interim use of the Ferris landfill.

After the presentation of evidence and arguments, the trial judge submitted two special interrogatories to the jury. Special question number one required a finding as to the fair market value of the 50-acre Ballwag site, which the jury fixed at $225,000. Special question number two required a finding as to the cost of supplying a functionally equivalent substitute landfill site, which the jury fixed at $723,654.01. The district court then concluded that as a matter of law the market value of the Ballwag site was the proper measure of compensation and entered judgment for $225,000.00. He set interest on the unpaid balance of $25,050.00 at 6%.[3] Duncanville appeals.

The Fifth Amendment to the U.S. Constitution provides,

> [N]or shall private property be taken for public use, without just compensation.

The issue here is what measure of compensation is "just" when a public entity is obligated to replace its condemned public facility.

In *United States v. 564.54 Acres of Land, More or Less, Situated in Monroe and Pike Counties, Pennsylvania, (Lutheran Synod)*, 441 U.S. 506, 99 S.Ct. 1854, 60 L.Ed.2d 435 (1979), the Supreme Court declined to discuss the precise question presented here. The Court ruled that the pay-

[3] This amount, a total of $29,934.75, was deposited in the court's registry on December 29, 1981.

ment of fair market value is sufficient compensation to a private non-profit organization whose property is operated for a public purpose.

In *Lutheran Synod*, the Court acknowledged that generally an award of fair market value strikes "a fair 'balance between the public's need and the claimant's loss' upon condemnation of property for a public purpose." 441 U.S. at 512, 99 S.Ct. at 1857, 60 L.Ed.2d at 441, *quoting United States v. Toronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. 396, 402, 70 S.Ct. 217, 221, 94 L.Ed. 195 (1949). Nevertheless, the Court recognized and reaffirmed that fair market value is not and cannot be the single, inflexible measure of just compensation.

> "[W]hen market value has been too difficult to find, or when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards. . . . Whatever the circumstances under which such constitutional questions arise, the dominant consideration always remains the same: What compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill?"

441 U.S. at 512, 99 S.Ct. at 1857, 60 L.Ed.2d at 442, *quoting United States v. Commodities Trading Corp.*, 339 U.S. 121, 123, 70 S.Ct. 547, 549, 94 L.Ed. 707 (1950). *See also United States v. 320.0 Acres of Land, More or Less, in the County of Monroe, State of Florida*, 605 F.2d 762, 780-81 (5th Cir.1979).

The substitute facilities doctrine arose from that realization that "just compensation" and "fair market value" are not always synonymous. Its genesis is in language written by Chief Justice Taft in *Brown v. United States*, 263 U.S. 78, 44 S.Ct. 92, 68 L.Ed. 171 (1923). In *Brown*, three-quar-

ters of the town of American Falls, Idaho, was to be inundated and destroyed by the waters of a reservoir on the Snake River. In that extreme situation, the Chief Justice observed, "a method of compensation by substitution would seem to be the best means of making the parties whole." 263 U.S. at 83, 44 S.Ct. at 94, 68 L.Ed at 180.[4]

[2] Generally, the substitute facilities standard has been applied to the condemnation of streets, alleyways, bridges, sewers, and other public facilities for which fair market value cannot accurately be determined. Numerous cases have recognized and applied this principle. *See, e.g., United States v. Streets, Alleys and Public Ways in Village of Stoutsville, in Monroe County, Missouri,* 531 F.2d 882 (8th Cir.1976); *County of Sarpy, Nebraska v. United States,* 181 Ct.Cl. 666, 386 F.2d 453 (Ct.Cl. 1967); *United States v. Certain Lands Located in the Townships of Raritan and Woodbridge, Middlesex County, New Jersey,* 246 F.2d 823 (3rd Cir.1957); *Town of Clarksville, Va. v. United States,* 198 F.2d 238 (4th Cir.1952); *City of Fort Worth, Tex. v. United States,* 188 F.2d 217 (5th Cir.1951); *United States v. Los Angeles County, Cal.,* 163 F.2d 124 (9th Cir.1947); *United States v. Des Moines County, Iowa,* 148 F.2d 448 (8th Cir.1945); *Jefferson County, Tennessee v. Tennessee Valley Authority,* 146 F.2d 564 (6th Cir.1945). If no substitute facility is necessary, fair market value will be the standard for compensation, when it can be ascertained. *See United States v. 3,727.91 Acres of Land, More or Less, in*

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[4] As Justice Marshall points out in *Lutheran Synod,* 441 U.S. at 509, 99 S.Ct. at 1856, 60 L.Ed.2d at 439, *Brown* addressed the scope of the government's condemnation power. Its reference to substitution as a proper measure of compensation must be viewed as dictum. Recognizing this, we do not rely upon Brown as authority for our decision today, but mention it only for its historical importance.

County of Pike, State of Missouri (Ellsberry Drainage District), 563 F.2d 357 (8th Cir.1977); *United States v. Certain Property in Borough of Manhattan, City, County and State of New York*, 403 F.2d 800 (2d Cir.1968); *State of California v. United States*, 395 F.2d 261 (9th Cir.1968). Often, however, only nominal damages are justified where streets, highways and the like need not be replaced. *See, e.g., Village of Stoutsville, supra; Franklin County, Georgia v. United States*, 341 F.2d 106 (5th Cir.1965), *State of Washington v. United States*, 214 F.2d 33 (9th Cir.1954); *Woodville, Okla. v. United States*, 152 F.2d 735 (10th Cir.1946).

This is a rather different case. Unlike the vast majority of substitute facility cases, here the parties agree that the landfill has a determinable market value, although at trial they disagreed as to what that value was.[5] The United States contends that because fair market value can be ascertained, that value must be the measure of compensation. We conclude, however, that the reasonable cost of a functionally equivalent facility is the just measure of compensation when a public entity is obligated to replace the condemned property.

[3, 4] Although the indemnity principle which animates the just compensation clause of the Fifth Amendment "has not been given its full and literal force," *Lutheran Synod*, 441 U.S. at 510-11, 99 S.Ct. at 1856-57, 60 L.Ed.2d at 440, it must nevertheless be our aim to place a condemnee "in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more." *Olson v. United States*, 292 U.S. 246, 255, 54 S.Ct. 704, 708,

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[5] That controversy was, of course, settled by the jury. Its finding of $225,000 is somewhat more than the highest figure suggested by the government and considerably less than the lowest figure suggested by Duncanville.

78 L.Ed. 1236, 1244 (1934). *See also 320.0 Acres of Land*, 605 F.2d at 780. The purpose of just compensation is to reimburse the owner/condemnee for the loss he has suffered by the taking of the property.

Duncanville's situation is very different from that of the typical private landowner, or that of the nonprofit condemnee in *Lutheran Synod*. As the Supreme Court emphasized,

> [R]espondent [Synod] is under no legal or factual obligation to replace the camps, regardless of their social worth. As a private entity, respondent is free to allocate its resources to serve its own institutional objectives, which may or may not correspond with community needs. Awarding replacement cost on the theory that respondent would continue to operate the camps for a public purpose would thus provide a windfall if substitute facilities were never acquired, or if acquired, were later sold or converted to another use.

441 U.S. at 515-16, 99 S.Ct. at 1859, 60 L.Ed.2d at 444.

[5, 6] In contrast, in order to continue to provide a necessary public service, Duncanville presumably was required to spend certain monies to purchase a new landfill site and prepare that site for its purpose.[6] Its loss from the condemnation was the amount of money reasonably

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[6] The collection and disposal of garbage by a municipality is a governmental function imposed by law. *City of Fort Worth v. George*, 108 S.W.2d 929 (Tex.Civ.App. – Fort Worth, 1937, *writ ref.*). For the purposes of this appeal, the government does not directly challenge the fact that Duncanville was thereby obligated, either by law or practical necessity, to maintain a sanitary landfill. Solid waste disposal and sanitary landfills are regulated under Tex.Rev.Civ.Stat.Ann. art. 4477-7 (Vernon Supp.1982).

spent in that venture to create a functionally equivalent facility. To deny Duncanville reimbursement for its unavoidable loss would be to deny just compensation.

The Second Circuit has reached the same conclusion. *Certain Property in Borough of Manhattan, supra; United States v. Certain Property in Borough of Brooklyn,* 346 F.2d 690 (2d Cir.1965). *Certain Property in Borough of Manhattan* is particularly instructive. That case dealt with the condemnation by the Post Office Department of a public bath and recreation building owned and operated by New York City. As here, it was agreed that the building had a market value. The City contended that it had a duty to replace the condemned structure and that it was entitled to the cost of the functionally equivalent facility. The United States argued that the City had no legal require-

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The decision as to whether substitute facilities are in fact necessary is a question for the trial court. *Wardy v. United States,* 402 F.2d 762, 763 (5th Cir.1968). Here the court made no finding on the issue, which should be decided on remand. At trial and on appeal, the United States has mentioned testimony to the effect that Fort Worth has been contracting out its garbage collection to private firms. The most that can be said from this mention is that the government is attempting to cast doubt on the necessity for Duncanville to maintain a sanitary landfill. If so, this can be remedied on the hearing on remand.

We remind the trial court that in considering this question, it is not enough for the government to demonstrate a "reasonably adequate" or "reasonably passable" alternative method of garbage collection which does not require city operation of a sanitary landfill. The City is entitled to a facility or method which will dispose of the refuse of its citizens "in an equally adequate manner as would have been true had there been no condemnation." *City of Fort Worth,* 188 F.2d at 221. This necessitates the acknowledgement and consideration of any practical, economic or logistical advantages of the City's operation and control of its own sanitary landfill.

ment to replace the building and that in any event market value was the proper standard of compensation.

The Second Circuit, reversing the district court, held for the City. It concluded,

> The 'substitute facilities' doctrine is not an exception carved out of the market value test; it is an alternative method available in public condemnation proceedings. [Citations omitted] When circumstances warrant, it is another arrow to the trier's bow when confronted by the issue of just compensation.
>
> When the public condemnee proves there is a duty to replace a condemned facility, it is entitled to the cost of constructing a functionally equivalent substitute, whether that cost be more or less than the market value of the facility taken. [Citations omitted] The duty may be legally compelled or one which arises from necessity . . . We hold, therefore, that if the structure is reasonably necessary for the public welfare, compensation is measured not in terms of "value" but by the loss to the community occasioned by the condemnation.

403 F.2d at 803-04.

That loss to the community is the cost of providing the necessary substitute facility. As we pointed out in *City of Fort Worth,* where we also rejected a strict view of the meaning of "necessity", "In any proper view of the requirements of just compensation, the substitute 'necessary' is that necessary to readjust [the City's] street and highway system to serve the municipality's requirements and needs in as adequate a manner and extent and with equal utility as such system would have provided had the facility in question not been condemned, so far as this is reasonably practical." 188 F.2d at 222. That view applies as well to the replacement of the landfill condemned here.

In *United States v. State of South Dakota Game, Fish and Parks Department*, 329 F.2d 665 (8th Cir.1964), decided before either *Certain Property in Borough of Brooklyn* or *Certain Property in Borough of Manhattan*, the Eighth Circuit apparently reached a different conclusion. In that case, the United States had condemned a public park, also in order to build a reservoir. The trial judge, *sua sponte*, submitted a special interrogatory to the jury asking whether order to build a reservoir. The trial judge, *sua sponte*, substitute state park — a question which the jury answered in the affirmative. The court then awarded the state the cost of a substitute site.

The Eighth Circuit reversed. It held that the special interrogatory had impermissibly submitted a mixed question of law — "obligation" — and fact — "need" — to the jury. It concluded moreover that the substitute facility theory was improper because the market value of the condemned property was ascertainable.

We find it unnecessary to determine whether we would follow *South Dakota Game, Fish and Parks Department*. First, the finding of need was highly suspect in that case. Second, and more significant, in *Ellsberry Drainage District, supra*, a more recent case, the Eighth Circuit cited *Certain Property in Borough of Manhattan* and recognized that "[t]he substitute facilities doctrine is not an exception to the fair market value test but merely an alternate means of determining what just compensation is when a public facility is involved." 563 F.2d at 360. In a footnote, the Court observed, "Under the substitute facility doctrine if the structure is reasonably necessary for the public welfare, then the public condemnee is entitled to the cost of constructing a functionally equivalent substitute. However, the key to the application of this doctrine is whether the facility need be replaced." 563 F.2d at 359, n. 2.

Considering the peculiarities of *South Dakota Game, Fish and Parks Department*, and in light of *Ellsberry Drainage District*, there is no indication that the Eighth Circuit would reach a result contrary to that which we reach today. If it would reach such a result, by this opinion which creates no conflict we must respectfully disagree, ally ourselves with the Second Circuit and conclude that here the measure of just compensation is the reasonable cost of a functionally equivalent substitute facility.

[7] The trial court held that Duncanville had not met its burden of proving the cost of a functionally equivalent substitute facility and so had forfeited its case on the issue. With this we must disagree. Duncanville submitted evidence of the price of the land and of the expense of preparing the site. Witnesses testified that it was necessary to acquire the entire tract, at that price, in order to avoid more costly severance damage suits. We express no opinion as to the validity of these contentions, but we consider them sufficient to fulfill Duncanville's burden of presenting a case as to the cost of substitute facilities.[7]

An owner of condemned property "must be made whole but is not entitled to more." *Olson*, 292 U.S. at 255, 54 S.Ct. at 708, 78 L.Ed. at 1244. Accordingly, the district court should at least take into account the comments of the Second Circuit that

> [E]quitable principles undergirding just compensation require that the substitution cost be discounted by reason

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[7] At trial the government presented evidence as to the actual cost of several "comparable" landfill sites. The record clearly shows that all but one of these sites were much too far from Duncanville to be even hypothetically suitable for use as Duncanville's municipal landfill. The government did not demonstrate that any tracts other than the Ellis County site were available for purchase for landfill use in the Duncanville area.

> of the benefit which accrues to the condemnee when a new building replaces one with expired useful years. With deference to several contrary holdings, we believe the amount should be calculated and an appropriate deduction made. [Footnotes omitted]

403 F.2d at 804.

Here the City of Duncanville has perhaps gained noticeably from the replacement of the Ballwag fill with the new Ellis County site. The Ellis County site comprises 113.7 acres compared with 50 acres at Ballwag, some 15 of which had already been filled.[8] According to uncontradicted testimony, the Ellis County site can be filled to a depth of about 20 feet, as opposed to 10 feet at Ballwag. While the Ellis County site is approximately two miles farther away, it is accessible via faster roads. According to testimony, the Ellis County site has a potential life of approximately 41.6 years, while Ballwag was good only for about 12.8 years more. Generally there is disagreement as to the details of the comparative capacities of the two sites. But it is very clear that the Ellis County site is much better in terms of fillable acreage and life-span than Ballwag. In this particular tale of two landfills, Duncanville's garbage might well be heard to say, "It is a far, far better rest I go to, than I have ever known."

Although it recognized that Duncanville might be entitled to the cost of a reasonably necessary substitute facility, the trial court's instruction on special question number two did not take into account the need to deduct

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[8] A portion of the Ballwag acreage was occupied by a creek. At trial there was some dispute as to whether that portion should properly be considered "fillable" acreage.

for the benefits which Duncanville gained from the acquisition of the new fill. The judge told the jury:

> As I previously instructed you, fair market value may not be the sole measure of just compensation. The "cost of substitute facilities" is an alternative measure of just compensation in this case. I will now instruct you regarding this measure of just compensation in this case.
>
> The burden is on the City of Duncanville to establish, by a preponderance of the evidence in the case, that the cost of substitute facilities was as much as the City claims. To "establish by a preponderance of the evidence" has been previously defined, and you are directed to refer back to that definition.
>
> By cost of substitute facilities is meant that compensation due the City of Duncanville for the taking of its public facilities measured by the reasonable cost of supplying substitute facilities reasonably necessary to enable it to serve its constituents in approximately the same way as it would had the condemnation not occcured. It is a method of compensation by substitution. You are to determine the reasonable cost of construction of a functionally equivalent substitute sanitary landfill.
>
> Supply stated, the cost of substitute facilities represents that amount of just compensation in money to be awarded which will sufficiently allow the City of Duncanville to provide for the replacement of the property and their public facility taken by the Government.

[8] While this instruction fairly set forth the general purpose and meaning of "substitute facilities," we conclude that it was inadequate to enable the jury to make a fair and complete determination of the costs, including consideration of benefits received, of this particular substitute

facility. The "reasonable cost" of a "functionally equivalent substitute sanitary landfill" is too brief a standard to ensure that the jury will balance these various positive and negative attributes.[9] Accordingly, we decline to adopt the jury's award of $723,624.01 and remand the case to the district court for a new trial.

[9] Initially we leave the specifics of the charge to the sound discretion of the trial judge. Likewise, we express no opinion as to the merits or pecuniary accuracy of the various costs claimed by Duncanville.[10] We think it wise,

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[9] We do not adopt, or impose upon the district court, any particular method for making this determination. One possible approach, however, was suggested by the Second Circuit in *Certain Property Borough of Manhattan:*

> Several formulas are appropriate. The one that appears suitable under the facts in the present case is the mathematical formula: One minus the ratio that the remaining useful life of the condemned building [landfill] bears to the useful life expectancy of the substitute facility.

403 F.2d at 804, note 11.

[10] Solely for purposes of illustration, we set forth below the list of costs which Duncanville claimed it incurred in the purchase and preparation of the Ellis County side:

1	Land Cost (Actual)	$ 583,400.00
2	Relocating Mobil Pipeline (Actual)	282,406.63
3	Site Preparation (Actual)	13,063.98
4	Permanent Fencing (Actual)	15,290.52
5	Off-Site County Road (Actual)	107,288.00

however, to mention a few of the expenses for which Duncanville is entiled to compensation. Clearly Duncanville is entitled to reimbursement for the reasonable cost of an alternative site, along with the reasonable cost of preparing that site for use as a landfill. Whether the price actually paid is reasonable under the circumstances is for the jury to decide. In addition, Duncanville is entitled to those expenses incurred in using the temporary site at Ferris, over and above those which would have been incurred at Ballwag.

6	Relocating Stock Pond (Actual – $10,332.50, less $3,500.00)	$ 6,832.50
7	Engineering Study (Actual)	15,000.00
8	Soils Investigation (Actual)	6,479.49
9	Engineering for Soils Inspection of First and Second Cell Areas (Actual)	1,336.39
10	Engineering for Soils Inspection of Additional Cells 150 Cells @ $700.00 Each (Estimated)	105,000.00
11	Three (3) Groundwater Monitor Wells and Initial Resistivity Survey (Actual)	8,419.08
12	Earth Resistivity Survey for Remaining Portion (Estimated – 20 yr. @ $1,000/yr.)	20,000.00
13	Trips to Midlothian and Austin by City Officials in Preparation of Permit	294.93
14	Attorney Fees Obtaining Permit (Estimated)	1,000.00
15	Addition Cost – Landfill Operations Ferris vs. Ballwag	76,927.70
16	Additional Maintenance Cost Trips to Ferris Landfill	25,882.83
17	Additional Fuel Cost Trips to Ferris Landfill	7,689.11
	TOTAL	$1,276,311.16

In holding as we do today, we imply no criticism of the able trial judge. He faced several difficult legal issues and gave them careful and thoughtful consideration. His conduct of the trial was judicious and fair throughout. Nevertheless we hold that the reasonable cost of functionally equivalent substitute facilities is the proper measure of compensation here and that the court's instruction to the jury was inadequate to enable it to make a fully informed and intelligent assessment of that cost.

Very recently in *United States v. 329.73 Acres of Land, supra,* this Court held *en banc* that the 6% interest rate provided as delay damages by the Declaration of Taking Act "sets a floor, rather than a ceiling, on the rate of interest payable on the deficiency." 704 F.2d at 812. Neither the district court nor the government has undertaken to defend the constitutionality of a 6% interest ceiling. Instead the court held, and the government contends, that the City failed to introduce any evidence of an alternative appropriate interest rate; hence the use of the 6% "floor" is appropriate. The City admits its failure to introduce evidence, but contends that the district court erred in failing to take judicial notice of the prevailing rate of interest on U.S. Government Bills and U.S. Government Notes and Bonds for the time, as shown in Federal Reserve Bulletin No. 10, Volume 64, October, 1978.

In support of its argument that Duncanville's failure to introduce evidence justifies the use of the 6% interest floor, the government cities *United States v. 100 Acres of Land, More or Less, in Marin County, State of California (Drake's Beach),* 468 F.2d 1261 (9th Cir.1972) and *United States v. 174.12 Acres of Land, More or Less, in the County of Pierce, State of Washington,* 671 F.2d 313 (9th Cir.1982). In *Drake's Beach,* as here, the landowner, after the jury had rendered its verdict, moved the trial court to award

interest at the prevailing statutory rate, above 6%. The motion was denied and that denial affirmed on appeal. The Ninth Circuit held that the landowner should have presented evidence on the proper rate of interest at trial and that it was "not entitled to another trial to prove additional elements of just compensation which it could have presented during the original trial." 468 F.2d at 1270.

[10] In neither *Drake's Beach* nor *174.12 Acres,* however, was a new trial ordered on the underlying issue of just compensation. Here we remand for a new trial. In light of that fact, and in light of the very recent nature of our *en banc* holding in *329.73 Acres,* we are of the opinion that the City should be allowed to present evidence of the proper rate of interest at trial. As in *329.73 Acres,* we do not attempt to set a formula for the calculation of a proper interest rate; instead we leave that factual determination for remand upon the evidence to be presented. Since the proper interest rate is an element of "just compensation," we consider the determination of that rate to be within the province of the jury as finder of fact. *Wardy, supra; Drake's Beach, supra.*[11]

The Ballwag landfill will soon be, if it has not already been, transmogrified into a muddy lakebed. It leaves behind this lawsuit as a memento of its former life. In that guise, it will linger for some while longer in the federal courts. We regret that we cannot allow it to rest in watery peace, but we conclude that a new trial is necessary to determine what just compensation the City of Duncanville shall receive for its passing.

REVERSED and REMANDED.

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[11] At issue here is the interest to be assessed for the period of time from the date of taking to the date of judgment. This interest rate is not addressed by section 302 of the Federal Courts Improvement Act of 1982, P.L. 97-194, 28 U.S.C. § 1961, which establishes a varying rate for post-judgment interest in federal district court civil cases.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 81-1615

D. C. Docket No. CA-3-78-1221-D

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

50 ACRES OF LAND, ETC., ET AL.,
Defendants,

THE CITY OF DUNCANVILLE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

Before BROWN and JOLLY, Circuit Judges, and MAHON*, District Judge.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and that this cause be and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiff-appellee pay to defendant-appellant the costs on appeal to be taxed by the Clerk of this Court.

JUNE 13, 1983

ISSUED AS MANDATE:

* District Judge of the Northern District of Texas, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-1615

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

50 ACRES OF LAND, ETC., ET AL.,

Defendants,

THE CITY OF DUNCANVILLE,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion June 13, 1983, 5 Cir., 198 , F.2d)
(September 19, 1983)

Before BROWN and JOLLY, Circuit Judges, and MAHON*, District Judge.

PER CURIAM:

filed by the City of Duncanville, Texas (xx) The Petition for Rehearing/is DENIED and

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* District Judge of the Northern District of Texas, sitting by designation.

no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc/ is DENIED.

filed by the Government

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ John R. Brown

United States Circuit Judge

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